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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KIMBERLY BRANDT,
Petitioner,

VS.

SHOP 'N SAVE WAREHOUSE FOODS, INC.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I. RESPONDENT MISCHARACTERIZES PETITIONER'S ARGUMENT

Respondent's opposition is based on a mischaracterization of Petitioner's points, with no citation to any page or paragraph. Nowhere in the petition does Petitioner claim that, as Respondent puts it, "JAML for an Employer can **never** be appropriate," and nowhere does Petitioner claim that FRCP 50(a)(1) has been, "*sub silentio,* repealed." Resp. Brief 14. By exaggerating, Respondent attempts to couch Petitioner as advocating a return to a "pretext only" rule, as the Eighth Circuit followed before *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 [62 FEP Cases 96] (1993). This is simply not true.

Petitioner does maintain that since this Court's ruling in *Hicks*, there is a split among the Circuits (as well as between Petitioner and Respondent) as to what *Hicks* means. Petitioner stands by her earlier analysis of the case law in her Petition, and leaves this Court to come to its own conclusion regarding the split among the Circuits.

II. PRE-SELECTION OF LESS QUALIFIED MALE IS EVIDENCE OF SEX DISCRIMINATION

The most obvious mischaracterizations Respondent makes in its Reply Brief are its exclamations that "Plaintiff now bitterly complains that the Eighth Circuit adopted her theory of the case!" (Resp. Br. 29) and "The Eighth Circuit agreed with Brandt's theory of the case, and now *she is unhappy with her success!*" (Resp. Br. 9). In the underlying case, Petitioner did (and still does) argue that even if Shop 'n Save *did* preselect Frentzel, that adds to the evidence supporting a finding of discrimination. Precedent on that issue is clear. In its brief to the Eighth Circuit, Petitioner cited cases, including two from the

Eighth Circuit, which hold that evidence of preselection of a less qualified person outside the protected group supports a finding of illegal discrimination.

In *Lams v. General Waterworks Corp.*, 766 F.2d 386, 58 FEP 516 (8th Cir. 1985), a race discrimination case, two promotions were given to white men without the plaintiffs' knowledge. The plaintiffs were black men working in the defendant's Construction and Maintenance (C&M) department, which was primarily occupied by black employees. The promotions were to jobs in a primarily white department. As in *Brandt*, the plaintiffs had earlier expressed an interest in being promoted. Also as in *Brandt*, the openings were not posted, the plaintiffs were not told about the openings, and neither plaintiff was even considered for promotion.

The court noted the extreme disparity in the makeup of the defendant's workforce, in that a heavy concentration of black employees existed in the C&M department, while there were only three blacks employed outside that department. "This alone was sufficient to raise an inference of discrimination in promotions and hiring for those job classifications." *Id.* at 391. The Court also noted that reliance on word of mouth recruitment may easily result in discriminatory decisions. *Id.* at 392.

> The record shows that the blacks who had expressed an interest in promotion were simply not considered for the promotions. . . This maintenance of a largely segregated work force, by an all-white supervisory staff which ignored or discouraged black employees' efforts to see promotions into all-white or predominantly white job classifications, constitutes a clear violation of Title VII.

Id. At 393-394. The same logic applies to *Brandt* — simply substitute the word "woman" for "black," and "male" for "white."

A similar situation in a sex discrimination setting occurred in *Greer v. Univ. of Arkansas Bd. of Trustees*, 544 F. Supp. 1085,

33 FEP 77 (E.D. Ark. 1982) aff'd in relevant part, *Behlar v. Smith,* 719 F.2d 950, 33 FEP 92 (8th Cir. 1983). There, several women, including Dr. Rosemarie Word, alleged sexually discriminatory failure to promote. Dr. Word's claim arose in the spring of 1980, when the male Director of Educational Experiences announced his intent to retire at the end of that year. On March 25, 1980, Dr. Word applied to replace him. The next day, she was informed by letter that "a recommendation has already been made for a person to assume the majority of the responsibilities that were a part of the job description. . . ." *Id.* at 1096. Then, on June 4, 1980, a notice of vacancy was posted for the job, and included in the posted qualifications was "a minimum of three years of teaching experience at the public school level: preferably in mathematics, professional training or experience in the use and interpretation of statistical data." *Id.* at 1097. A preselected male, Dr. Rancifer, was given the job.

The District Court found that the quoted qualifications bore no reasonable relationship to the duties of this job; thus, their inclusion in the job posting "was simply a pretext for excluding Dr. Word from this position and making it available to Dr. Rancifer, who had taught math in high school." *Id.* at 1097. Again, this logic applies to *Brandt*: simply substitute Brandt's and Frentzel's names, and adjust the pretextual "qualifications." The Court found that this evidence supported an inference of sex discrimination, as well as a finding that the articulated qualifications were pretextual.

In *Coble v. Hot Springs School Dist. No. 6,* 682 F.2d 721, 29 FEP 201 (8th Cir. 1982), plaintiff Susan Chapman had worked for the defendant for ten years when her job was eliminated. She was told by a school administrator that a counseling job was about to open at another school in the district. Chapman expressed interest, and was told she would be interviewed. Later, however, she was told "the position might require certification in French and counseling." Chapman, who was not certified to teach

French, was not interviewed. The preselected man who got the job, Drew Alexander, was the only teacher in the district with certification in French and in counseling.

The Eighth Circuit reversed a judgment for defendant on Chapman's claim, saying, "There was persuasive evidence of preselection. . . . This evidence discredited the validity of the French certification requirement. Chapman established a prima facie case by showing that she had 'applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*'" *Id.* at 728 (emphasis added; citation omitted). The *Brandt* evidence of preselection (making the job fit Frentzel's background) is strikingly similar to that in *Cole*, and gives rise to the same inference. *Coble* remains the law of the Eighth Circuit, as well as other circuits. *See, e.g., Hartman v. Wick*, 600 F. Supp. 361, 363; 36 FEP 622, 625 (D.C.D.C. 1984) ("If proven, such preselection, in the form of 'tailoring' the job qualifications to those of a particular candidate, violates Title VII.") (citing *Coble*).

In *Roberts v. Gadsden Memorial Hospital*, 835 F.2d 793, 45 FEP 1246 (11th Cir. 1988), the Eleventh Circuit was faced with another preselection case with similarities to *Brandt*. There, a white maintenance supervisor resigned, having earned a wage of $4.42 per hour, and recommended a subordinate black employee, Roberts, to replace him. The defendant offered the job to Roberts, but at a wage of $3.50 per hour. Roberts turned down the offer because of the wage disparity, but did perform the duties of the job until a permanent replacement (white male) was hired. Roughly three years later, a new administrator came to the hospital, and forced the resignation of the white maintenance supervisor. That same day, the new administrator filled the job with another white male, Harrison, who had been working there for only three weeks as a scrub technician, but was a social friend of the new administrator. As in *Brandt*, no notice of the opening

had been posted. Accordingly, Roberts did not apply, although his interest in the job was obvious from his earlier experience. Roberts filed a claim for racially discriminatory failure to promote, and won a judgment. The Eleventh Circuit found that he established a prima facie case:

> [W]hen the failure to promote arises out of an informal, secretive selection process, . . . a plaintiff may raise an inference of intentional, racially-disparate treatment without proving that he technically applied for, and failed to obtain, the promotion. . . . Accordingly, rather than technically retrace the District Court's steps through the McDonnell Douglas-Burdine test, we will engage in a more flexible analysis to determine whether the record supports the district court's finding. . . .

Id. at 797. The Court found that the administrator had placed "undue emphasis" on Harrison's college degree, stating, "The fact that Harrison had achieved a degree in horticulture did not overshadow Roberts' cumulative experience of more than a decade of 'hands-on' maintenance experience at GMH." *Id.* at 797. Also, and most relevant to *Brandt*, the Court noted the friendship between Harrison and the decision maker, and found that "this promotion decision was nothing more than a typical 'good ol' boy' appointment." *Id.* at 798. Accordingly, Roberts met his *McDonnell Douglas* burden of raising an inference of discriminatory motivation, as well as pretext. *Id.* at 799.

Thus, in each of these four cases, the courts found that in Title VII settings, evidence of preselection of a member outside the protected group supports a finding of intentional discrimination, as well as pretext. Petitioner presented the same scenario. Petitioner proved what the true qualifications were for an apprentice meat cutter, according to the company's collective bargaining agreement and its own apprentice program developed specifically for the opening at issue. Those qualifications

did not change with the new contract, entered into after the promotion at issue. The company could produce nothing but the decision maker's testimony to show that management experience and college were added qualifications for this particular opening — the only apprentice meat cutter opening in the company has ever had. The jury reasonably believed the added qualifications were not true, but were tailored to fit the preselected man — a man who had virtually no meat experience. Thus conclusion is bolstered by the facts that none of the decision makers asked Frentzel, or even knew at trial, how much college he had; Frentzel did not write it on the application he filled out *after* the interview; and Frentzel never made it into management. Clearly, under *Lams, Greer, Coble, and Roberts*, this preselection evidence supports a finding of sex discrimination.[1] Yet, the Eighth Circuit held the opposite, without even addressing this "good ol' boy network" precedent.

Here is where the twist comes into this case. The majority for the Eighth Circuit *believed* Frentzel was preselected, stating, "It is apparent that the position was created for Frentzel, with the job's 'qualifications' tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his 'qualifications'." Yet, despite finding preselection and disbelieving the Respondent's denial of it, and despite its own precedent in *Coble* and *Lams*, the majority found that evidence of a "good ol' boy" network was evidence of a *non*-discriminatory motive. No evidence from

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[1] Understandably, in light of these cases, Respondent did not admit that Frentzel got the job because of this "good ol' boy" network— rather, it flatly *denied* it. When asked at trial if he knew Frentzel was looking for a job when management decided to hire an apprentice meat cutter, one of the decision makers answered "No." If the fact finder disbelieves this denial (as the jury, the judge, and the Eighth Circuit did), the cover-up itself further reinforces the notion that the preselection was motivated by illegal discrimination.

either Petitioner or Respondent supported the conclusion that this was the result of anything other than sex discrimination.

The Eighth Circuit majority relied on *Rothmeier* for the proposition that evidence from the Plaintiff actually *refuting* its own theory of sex discrimination defeats the inference of sex discrimination. But this is not a case like *Rothmeier,* where the plaintiff acknowledged he was fired for a non-discriminatory reason and therefore no inference of discrimination remained. The majority's opinion flies in the face of reason, as well as *Lams, Greer, Coble* and *Roberts.* As Judge Heaney wrote in his minority opinion, "Brandt's pretext evidence does not point to a nondiscriminatory reason for passing her over nor has she offered or acknowledged such a justification. Rather, Brandt vigorously maintains that Shop n' Save's decision was actually gender-motivated." Judge Heaney is exactly right, as was Judge Adelman and the jury who heard the case. Under clear Eighth Circuit precedent, Brandt has carried her burden of proof.

III. RESPONDENT'S MISCHARACTERIZATIONS OF THE RECORD

Respondent claims in its Statement of the Case (Resp. Br. at 4) that Frentzel had four years of college, citing three pages of the transcript in this case, but not filing those pages with this Court. A review of the cited pages of the transcript reveals no such testimony. Appendix A.

Secondly, Respondent claims that neither Dougherty, Fant nor Howard knew of Plaintiff's interest in a meatcutter position (Resp Br. 5); yet, on the next page, Respondent admits that Plaintiff testified she told Howard. Respondent then simply argues the facts, claiming that this one conversation would not have "stuck out" in Howard's mind— an argument that the jury clearly didn't buy. This is understandable, given that Kim Brandt was the only woman who sought a promotion into the

man's world of meatcutting. In any event, it is clearly a factual determination for the jury to make.

CONCLUSION

Despite Respondent's misstatements of the record and Petitioner's argument, the record clearly demonstrates evidence upon which a jury could reasonably base a finding of sex discrimination. This evidence includes the sexually segregated workforce, pay disparity, and preselection of a male for the job through the "good ol' boy" network. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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